



November 2, 2018

**By Email and FOIA Online**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, D.C. 20460  
(202) 566-1677  
Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: FOIA Request for Information Related to the Application of Systematic Review in TSCA Risk Evaluations**

Dear Freedom of Information Officer:

Earthjustice submits this request (the “Request”) for records on behalf of Earthjustice, the Natural Resources Defense Council (“NRDC”), Environmental Defense Fund (“EDF”), and Safer Chemicals Healthy Families (“SCHF”) (collectively, the “Requesters”) in accordance with the provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2016), and the implementing regulations of the U.S. Environmental Protection Agency (“EPA” or the “Agency”), 40 C.F.R. Part 2. The purpose of the Request is to obtain records regarding the development and use of EPA’s *Application of Systematic Review in TSCA Risk Evaluation*, EPA Document #740-P1-8001 (May 2018) (“TSCA Systematic Review Document”), *available at* <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/application-systematic-review-tsca-risk-evaluations>. The TSCA Systematic Review Document “sets out general principles to guide EPA’s application of systematic review in the risk evaluation process” under the Toxic Substances Control Act (“TSCA”), including but not limited to ten TSCA risk evaluations that are currently underway.

**DEFINITIONS**

The Requesters seek the unredacted records listed below regarding the TSCA Systematic Review Document. The use of the word “unredacted” in this Request means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you can disclose only some of the information contained in a particular record, please provide us with a copy of the record with redactions of only the information that you have determined to be properly withheld and explain the basis for your determination that such information must be withheld.

The use of the word “records” herein means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, emails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, summaries of telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. The

term “records” as used above also includes any personal email messages, telephone voice mails or text messages, and internet ‘chat’ or social media messages, to the full extent that any such messages fall within the definition of “agency records” subject to FOIA, and including any attachments. Per EPA records management policy, electronic messages such as text messages are agency records, which must be preserved and made accessible under FOIA. *See* U.S. Env’tl. Prot. Agency Info. Pol’y, Records Management Policy (2018) at 3, <https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf>. Therefore, a production of responsive records must include records using services including, but not limited to: Google Chat, Google Hangout, Skype, IBM Sametime, Novell Groupwise Messenger, Facebook Messenger, iMessage and all other texting services, Short Message Service (SMS) and Multimedia Messaging Service on devices including but not limited to, Blackberry, Windows, Apple or Android devices; and Google Voice, Twitter Direct Message, Slack, WhatsApp, Pigeon, Yammer, Jive, and all other internal or external collaboration networks.

For this purpose of this request, the term “records” shall exclude any documents that have been posted for public review in the following dockets, and the Requesters are not asking EPA to search the following dockets in response to the Request:

- EPA-HQ-OPPT-2018-0210 (“Application of Systematic Review in TSCA Risk Evaluations; Notice of Availability”)
- EPA-HQ-OPPT-2016-0723 (“1-4, Dioxane; TSCA Review and Risk Evaluation”)
- EPA-HQ-OPPT-2016-0725 (“Pigment Violet 29; TSCA Review and Risk Evaluation”)
- EPA-HQ-OPPT-2016-0732 (“Tetrachloroethylene; TSCA Review and Risk Evaluation”)
- EPA-HQ-OPPT-2016-0733 (“Carbon Tetrachloride; TSCA Review and Risk Evaluation”)
- EPA-HQ-OPPT-2016-0735 (“HBCD (Hexabromocyclododecane) or Cyclic Aliphatic Bromide Cluster; TSCA Review and Risk Evaluation”),
- EPA-HQ-OPPT-2016-0736 (“Asbestos; TSCA Review and Risk Evaluation”)
- EPA-HQ-OPPT-2016-0737 (“Trichloroethylene; TSCA Review and Risk Evaluation”)
- EPA-HQ-OPPT-2016-0741 (“1-Bromopropane; TSCA Review and Risk Evaluation”)
- EPA-HQ-OPPT-2016-0742 (“Methylene Chloride; TSCA Review and Risk Evaluation”)
- EPA-HQ-OPPT-2016-0743 (“N-Methylpyrrolidone; TSCA Review and Risk Evaluation”)

The use of the term “First 10 TSCA Risk Evaluations” herein means EPA’s TSCA risk evaluations for 1,4-Dioxane, 1-Bromopropane, Asbestos, Carbon Tetrachloride, Cyclic Aliphatic Bromide Cluster, Methylene Chloride, N-Methylpyrrolidone, Pigment Violet 29, Tetrachloroethylene, and Trichloroethylene. *See* EPA, Designation of Ten Chemical Substances for Initial Risk Evaluations Under TSCA, 81 Fed. Reg. 91927 (Dec. 19, 2016).

The use of the term “data/information source” herein shall have the same meaning ascribed to that term in the TSCA Systematic Review Document. *See, e.g.,* TSCA Systematic

Review Document at 30 (“The term data/information source is used in this document in a broad way to capture the heterogeneity of data/information in TSCA risk evaluations (e.g., experimental studies, data sets, published models, completed assessments, release data).”)

The use of the term “score(s)” herein shall refer to the score or scores assigned to data/information sources using the procedures in the TSCA Systematic Review Document. *See* TSCA Systematic Review Document at 33-35 (summarizing procedures for assigning scores to data/information sources). The term “score(s)” shall encompass score(s) assigned to individual evaluation metrics as well as the overall score(s) assigned to data/information sources.

## **RECORDS REQUESTED**

In accordance with FOIA, please provide us with all of the following from June 22, 2016 onward:

- 1) Unredacted records containing the score(s) assigned to any data/information source reviewed in connection with First 10 TSCA Risk Evaluations, including but not limited to reviewers’ comments and any records explaining the basis for such score(s);
- 2) Unredacted records relating to any adjustment of the score(s) assigned to any data/information source reviewed in connection with First 10 TSCA Risk Evaluations, including but not limited to any written justification for such adjustment.
- 3) Copies of all data/information sources (or, for published studies, a comprehensive list of such studies, including authors, title, date, and publication information) that have been excluded from further consideration in the First 10 TSCA Risk Evaluations based on an “unacceptable score” for one or more evaluation metrics.

## **RECORD DELIVERY**

To the extent practicable, the Requesters seek electronic copies of the above documents in native file format, or, if that is not practicable, with full metadata for all fields. *See* 5 U.S.C. § 552(a)(3)(B) (agency shall provide records in any form or format if the record is readily reproducible in that form or format). If any information requested herein was, but is no longer, in EPA’s possession or subject to its control, please state whether it (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) is otherwise disposed of, and in each instance, please explain the circumstances surrounding and authorization for such disposition of it, and state the date or approximate date of it.

Agencies are advised to “make discretionary disclosures of information” and refrain from withholding records “merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.” Memorandum from the Attorney General to Heads of Executive Departments and Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>. If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.
- (5) If you do not use your discretion to release such complete and unredacted records: (a) examine each information request to determine if reasonably segregable non-exempt information exists that may be released after redacting information deemed to be exempt; and, (b) provide us with a copy of each record with redactions of only the information that you have determined to be properly withheld;

## **FEE WAIVER REQUEST**

Pursuant to 5 U.S.C. § 552, we request a fee waiver because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). As demonstrated below, all of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)–(iv), weigh in favor of granting our fee waiver request. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

### **I. THIS REQUEST IS IN THE PUBLIC INTEREST.**

#### **A. Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government.**

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government” 40 C.F.R. § 2.107(l)(2)(i). The records concern “identifiable operations” because they relate to the preparation of EPA’s risk evaluations under the Toxic Substances Control Act. The Department of Justice Freedom of Information Act Guide acknowledges that “in most cases records possessed by the federal agency will meet this threshold” of identifiable operations or activities of the government. *Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers* at 27, available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>. There is no question that this is such a case.

#### **B. Factor 2: Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities.**

The next factor considered by EPA is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. §

2.107(l)(2)(ii). To satisfy this requirement, the records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already...in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 15 C.F.R. § 4.11(l)(2)(ii), of government operations or activities. EPA intends for the TSCA Systematic Review Document to “guide EPA’s application of systematic review in the risk evaluation process for the first ten chemicals . . . as well as future [chemical] evaluations” under TSCA. TSCA Systematic Review Document at 9. “Integrating systematic review principles into the TSCA risk evaluation process is critical to develop transparent, reproducible and scientifically credible risk evaluations.” *Id.* Disclosure of information concerning the application of the TSCA Systematic Review Document will enable the public to better understand EPA’s decision-making process and to effectively participate in the public review of TSCA risk evaluations, including but not limited to the First 10 TSCA Risk Evaluations. Moreover, the Request specifically excludes materials that are “already in the public domain” due to their inclusion in the EPA dockets for the TSCA Systematic Review Document and the First 10 TSCA Risk Evaluations.

**C. Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in the EPA’s TSCA Risk Evaluations.**

EPA next considers whether disclosure will contribute to “public understanding” of the subject. 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request, as opposed to the “individual understanding” of the requester. *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch, Inc. v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

Here, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” the evaluation and regulation of toxic chemicals under TSCA. EPA’s risk evaluations will help determine which chemical substances are subject to regulation under TSCA, and thus whether the public is adequately protected from chemical hazards. The TSCA Systematic Review Document will guide EPA’s determination of which studies and information are considered in the TSCA risk evaluation process. Despite acknowledging the “critical” nature of this document, *see* TSCA Systematic Review Document at 9, EPA has made little information available about the application of the TSCA Systematic Review Document, impairing the public’s ability to understand and meaningfully participate in the risk evaluation process.

The Requesters have the “ability and intention to convey this information to the public.” 40 C.F.R. § 2.107(l)(2)(iii). Earthjustice, NRDC, SCHF, and EDF are nonprofit environmental organizations with lawyers, scientists, and public policy professionals on their respective staffs.

They have made the promotion of safe and healthy communities free from the health burdens of toxic chemicals a top priority, and they were all actively engaged in the 2016 amendments to TSCA. They have expertise related to both the evaluation and regulation of chemicals under TSCA, and they are well-prepared to evaluate the requested records once received.

The Requesters also have mechanisms in place to share information obtained from the requested records with the general public and other interested organizations. They have submitted and publicized comments on the TSCA Systematic Review Document;<sup>1</sup> co-authored a brief in pending litigation challenging EPA's risk evaluation procedures;<sup>2</sup> and published articles, blogs, social media postings, and press releases concerning the regulation and evaluation of toxic chemicals.<sup>3</sup> The Requesters are well-positioned to share the requested information with interested audiences. Earthjustice's website receives approximately 816,000 page views per month and its quarterly print magazine has a circulation of approximately 100,000. EDF's website receives approximately 711,000 page views per month and its quarterly print magazine has a circulation of approximately 307,000. NRDC's website receives approximately 1.3 million page views per month and its weekly electronic environmental newsletter is distributed by email to more than 86,700 subscribers. Finally, all of the Requesters employ or retain communications professionals that can disseminate newsworthy information obtained from this request to the media.

**D. Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.**

The fourth factor EPA considers is whether the records are "likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (stating that the relevant test is whether public understanding will be increased after disclosure, as opposed to the public's understanding prior to the disclosure). Where information is not currently available to the general public, and where "dissemination of information...will enhance the public's understanding," the fourth factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

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<sup>1</sup> *See, e.g.*, Comments from NRDC on EPA's TSCA Systematic Review, Aug. 16, 2018, EPA-HQ-OPPT-2018-0210; Environmental Defense Fund Comments on Application of Systematic Review in TSCA Risk Evaluations, Aug. 16, 2018, EPA-HQ-OPPT-2018-0210; Comments of Safer Chemicals, Healthy Families, Center for Environmental Health et al. on Application of Systematic Review in Risk Evaluations under Section 6 of the Amended Toxic Substances Control Act, Aug. 16, 2018, EPA-HQ-OPPT-2018-0210

<sup>2</sup> *See* Brief of Petitioners Safer Chemicals Healthy Families et al. in Support of Petition for Review of TSCA Prioritization and Risk Evaluation Rules, No. 17-72260 (9th Cir. April 16, 2018).

<sup>3</sup> *See, e.g.*, EPA TSCA Systematic Review for Chemicals is Fatally Flawed, Aug. 6, 2018, <https://www.nrdc.org/experts/jennifer-sass/epa-tsca-systematic-review-chemicals-fatally-flawed>; EDF Submits Extensive Comments Critical of EPA OPPT's TSCA Systematic Review Document, Aug. 16, 2018, <http://blogs.edf.org/health/2018/08/17/edf-comments-epa-tsca-systematic-review-document/>; Safer Chemicals, Healthy Families and Allies Sue Trump EPA over New Toxics Rules, Aug. 14, 2017, <https://saferchemicals.org/newsroom/safer-chemicals-healthy-families-and-allies-sue-trump-epa-over-new-toxics-rules/>; Earthjustice Sues Trump Administration Over New Rules That Will Make it Harder to Protect Against Harm From Toxic Chemicals, Aug. 14, 2017, <https://earthjustice.org/news/press/2017/earthjustice-sues-trump-administration-over-new-rules-that-will-make-it-harder-to-protect-against-harm-from>.



This request satisfies the fourth factor. One cannot retrieve the requested records in their entirety, or all the information contained therein, through EPA's website or internet searches. Thus, the public's understanding of the application of the TSCA Systematic Review Document and its role in TSCA risk evaluation process "will be significantly enhanced by the disclosure." See 15 C.F.R. § 4.11(l)(2)(iv).

## **II. REQUESTERS HAVE NO COMMERCIAL INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS.**

Requesters are 501(c)(3) nonprofit organizations and they do not have any "commercial interest that would be furthered by the requested disclosure" of information. 40 C.F.R. § 2.107(l)(3)(i). The requested records would be used only in furtherance of their respective missions to inform and protect the public on matters of vital importance to the environment and public health.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify us and inform us of the basis for your decision.

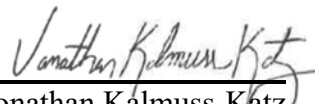
### **INSTRUCTIONS FOR RECORD DELIVERY**

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply "must...indicate within the relevant time period the scope of documents [EPA] will produce." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email at the contact information below:

Jonathan Kalmuss-Katz  
Earthjustice  
48 Wall St., 15th Floor  
New York, NY 10005  
jkalmusskatz@earthjustice.org

If you find that this Request is unclear or if the responsive records are voluminous, please contact me at (212) 823-4981 to discuss the proper scope of this Request. Thank you for your assistance.

Sincerely,

  
Jonathan Kalmuss-Katz  
Staff Attorney  
Earthjustice Northeast Regional Office  
48 Wall St., 15th Floor  
New York, NY 10005